

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

-----:  
UNITED STATES OF AMERICA :

-vs- :

Case No. 1:14-cr-397

DAVID E. BURKE,  
Defendant. :

DETENTION HEARING

January 21, 2015

Before: Theresa C. Buchanan, Mag. Judge

APPEARANCES:

Alexander T.H. Nguyen, Counsel for the United States

Marc A. Agnifilo and Lisa Manning, Counsel for the Defendant

The Defendant, David E. Burke, in person

1                   NOTE: The case is called to be heard at 2:02 p.m. as  
2 follows:

3                   THE CLERK: The United States versus David Burke,  
4 case 14-cr-397.

5                   MR. NGUYEN: Good afternoon, Your Honor. Alex Nguyen  
6 for the United States.

7                   THE COURT: Good morning.

8                   MS. MANNING: Good afternoon, Your Honor. Lisa  
9 Manning for Mr. Burke. And with me is Marc Agnifilo, he has  
10 been admitted pro hac vice on this case for Mr. Burke.

11                  THE COURT: Thank you. All right. This is the  
12 defendant's initial appearance. He has been charged with  
13 conspiracy under 18 U.S.C. section 371; importation contrary to  
14 law, ten counts of that, 11 counts of that, in violation of 18  
15 U.S. Code section 545; 11 counts of introducing misbranded  
16 drugs and devices in interstate commerce, in violation of 21  
17 U.S. Code section 331(a); unlicensed wholesale distribution of  
18 drugs, in violation of 21 U.S.C. section 331(t); and conspiracy  
19 to commit money laundering, in violation of 18 U.S.C. section  
20 1956(h).

21                  Counsel, what is the possible penalty for this  
22 offense?

23                  MR. NGUYEN: Your Honor, the maximum possible penalty  
24 is 196 years imprisonment, \$2.82 million fine, three years of  
25 supervised release, and a \$1,700 special assessment.

1                   THE COURT: And you're seeking detention?

2                   MR. NGUYEN: That's correct, Your Honor.

3                   THE COURT: Would you like to have the detention  
4 hearing tomorrow afternoon or Friday afternoon?

5                   MR. AGNIFILO: Is it possible to have it now, Your  
6 Honor?

7                   THE COURT: Is the Government ready?

8                   MR. NGUYEN: Yes, Your Honor.

9                   THE COURT: Okay. I have got the Pretrial report.

10                  MR. NGUYEN: Your Honor, with the help of the Court  
11 Security Officer, I'm just handing you up two exhibits.

12                  Essentially, the nature of the offense, the strength  
13 of the evidence here warrants pretrial detention because the  
14 defendant is a serious flight risk.

15                  Based on the nature of the offense, it's based -- the  
16 crime in this case is based almost entirely on deceit and  
17 fraud. For years the defendant was a key manager of the TC  
18 Medical Group, supervised the sales force, and coordinated the  
19 smuggling and sale of over \$18 million of misbranded  
20 prescription drugs. False Customs forms were used. False  
21 representations to the U.S. customers were made.

22                  And the defendant, as you can see from Government's  
23 Exhibit 1, him and almost everybody else in the organization  
24 used false names to sell the drugs.

25                  The weight of the evidence in this case is

1 overwhelming. E-mails from 30 or so accounts show clear  
2 knowledge of smuggling of misbranded drugs through fraud and  
3 deceit, the defendant's supervisory role, knowledge of the  
4 illegality.

5 And so, as you can see from Government's Exhibit 2,  
6 the various drugs recovered in the search warrant. And the  
7 defendant also confessed.

8 There are no significant ties, family, financial, or  
9 employment ties here in the United States at all, other than a  
10 sister in New York. The defendant is also a Canadian citizen  
11 with strong ties abroad. His parents and four siblings live  
12 abroad. And his father, who is here in the States, is also a  
13 drop shipper.

14 And so, we ask the defendant be detained.

15 THE COURT: His father is also a what?

16 MR. NGUYEN: His father, who is in the United States,  
17 Your Honor, was also involved in the scheme.

18 THE COURT: I see. Okay. Do you have argument?

19 MR. AGNIFILO: Thank you, Your Honor. Thank you for  
20 having me in your court.

21 This is the defendant's first bail application. When  
22 he was arrested in the Southern District of Florida, he  
23 essentially waived. And he was arrested, I believe it was  
24 December 23. So he has been incarcerated for about a month.

25 This is not -- significantly, this is not a case that

1 involves controlled substances or narcotic drugs. It involves  
2 medical products and devices, things like orthopedic  
3 injections, cosmetic devices, things like that.

4 So while the statutory maximum sentence, if they are  
5 all run together, obviously adds up to quite a formidable  
6 number, the defendant is not looking at that type of jail time  
7 under a Guidelines calculation with these offenses.

8 I would point out, and I think it is very  
9 significant, that the only other three co-defendants who have  
10 appeared before this Court have all been released on bonds  
11 without conditions.

12 THE COURT: Well, I don't know what their situation  
13 is.

14 MR. AGNIFILO: No, but I can provide some background.  
15 This defendant is not alleged to be a principal of SB Medical,  
16 Inc. And I say that because it's very clear from paragraphs 10  
17 and 11 of the indictment that there is only one individual  
18 alleged to be a principal, and that's the individual Tzvi  
19 Lexier or Lexier. He is the principal of this organization.  
20 My client is not.

21 My client, just like the other three defendants who  
22 have been released without conditions, basically worked  
23 allegedly on commission. That's what he did. He wasn't a part  
24 of this SB Medical, Inc. SB Medical, Inc. is sort of the heart  
25 and soul of what's alleged --

1                   THE COURT: Well, it says here that he oversaw the  
2 day-to-day operations. You mean he wasn't an owner, is that  
3 what you're trying to tell me?

4                   MR. AGNIFILO: He was not an owner. He wasn't a  
5 principal. He worked -- he basically got commissions. That's  
6 what the indictment alleges.

7                   And the indictment alleges that he worked, and he did  
8 the same thing that dozens of other people did, some of whom  
9 are co-defendants in this indictment, and that he was given a  
10 commission. He essentially received a paycheck from Mr.  
11 Lexier, who was the principal of SB Medical Group.

12                  The other entity, although it's listed in the  
13 indictment, does not appear to play much of a role in the  
14 indictment. And I say that because all of the financial  
15 information in the indictment are bank accounts controlled by  
16 SB Medical, Inc., money coming through SB Medical, Inc. And my  
17 client had no ownership interest, partnership interest,  
18 interest whatsoever in that business entity, just like the  
19 other three defendants.

20                  My client was born in the United States. He was born  
21 in Buffalo, New York, in 1980. He is a U.S. citizen. He has  
22 brothers and sisters, some of whom live in Canada. One of  
23 whom, Rachel Tuchman, lives in Woodmere, New York, which is in  
24 Nassau County, just east of New York City.

25                  I don't believe, Your Honor, that this is an

1 appropriate case for detention. There is no allegations --  
2 there is no crime of violence. There is no drug dealing in the  
3 traditional sense that is called for as a rebuttable  
4 presumption. There is no rebuttal presumption in this case.

5 This is a case that cries out either for an unsecured  
6 bond, as was the case with the other defendants, or at most a  
7 secured bond.

8 If Your Honor is leaning toward the possibility of a  
9 secured bond, I have a package that I had run by the Government  
10 yesterday. I e-mailed them and sent them some documents. And  
11 the proposed package is this, and I believe it's a reasonable  
12 one: A \$100,000 secured bond that is secured by the equity in  
13 the home at 705 Peninsula Boulevard in Woodmere, New York.

14 I've provided the Government with the title and  
15 appraisal of that property, and recent mortgage statements.  
16 And the available equity in that property, which is owned by  
17 the defendant's sister, Rachel Tuchman, is about \$200,000. He  
18 would live there. So he would live with his sister just  
19 outside New York. She would put up her house in Woodmere, New  
20 York. She would be a co-signer to the bond.

21 The Government already has his United States passport  
22 and his Canadian passport. So the Court could order that he  
23 not go out and get new travel documents, which of course he  
24 will not do. His travel could be restricted to the Eastern  
25 District of Virginia, the Eastern District of New York where

1 Woodmere, New York, is located, and the Southern District of  
2 New York, which is where my office is located. And if he takes  
3 the train, he would have to travel between those places.

4 And I think that's -- those are reasonable conditions  
5 given this case. Again, the defendant is not all that  
6 differently situated than the other defendants. And I think  
7 this is the kind of case that's not a detention case, it's not  
8 appropriate for detention.

9 Again, when we see detention, we tend to see  
10 demonstrated risk of flight. This young man has hired an  
11 attorney, he has hired me, he has hired local counsel here in  
12 Virginia, he is obviously intent and committed, financially  
13 committed to defending this case. He is going to defend this  
14 case.

15 We have an arraignment before Judge Trenga on  
16 January 30 at 9 a.m. He'll be here, I'll be here. And there  
17 is no reason to keep him in prison pending the outcome of this  
18 case. He is a U.S. citizen. And the fact that he has lived in  
19 Canada for a good part of his life does by itself make him a  
20 risk of flight. He does not have any --

21 THE COURT: I don't see here that he is a U.S.  
22 citizen. It says that he was admitted -- he was legally  
23 admitted as a non-immigrant.

24 MR. AGNIFILO: That's not true. He was born in  
25 Buffalo, New York.

1 MR. NGUYEN: He has an American passport, Your Honor.

2 THE COURT: I see. Okay. But this says he was born  
3 in Toronto, Canada.

4 MR. AGNIFILO: No, he moved to Toronto, Canada, when  
5 he was in grade school. But, no, he was born in Buffalo, New  
6 York.

7 THE COURT: All right.

8 MR. AGNIFILO: And so, he is a U.S. citizen. He is  
9 going to come back. He is going to defend these charges. And  
10 I ask that he be released on a bond with those conditions.

11 Thank you, Your Honor.

12 THE COURT: Do you have something to add?

13 MR. NGUYEN: Yes, Your Honor.

14 Your Honor, on the three other defendants in this  
15 case who are out on bond, they live in the United States.  
16 Their role was significantly less. They were sales  
17 representatives and warehouse --

18 The defendant, by contrast, made commissions of over  
19 a million dollars. And he has strong, strong ties, not to some  
20 other country halfway around the world where it would be hard  
21 to get to, he has strong ties to Canada. He has lived there  
22 for 26 years. The majority of his family are in Canada. He  
23 has significant assets there. And at this stage he represents  
24 a significant flight risk.

25 MR. AGNIFILO: May I just add one thing, Your Honor?

1                   THE COURT: Okay.

2                   MR. AGNIFILO: Thank you. The defendant comes from,  
3 and I think this plays a role, comes from a very solid family.  
4 His father, while it's alleged that he played some role in  
5 this, he hasn't been arrested, and I don't believe there is  
6 significant evidence of his knowing involvement in this matter.  
7 He was a university professor his entire life. He is 72 years  
8 old now. He lives in Boynton Beach, Florida. He is an  
9 outstanding member of the community his entire life.

10                  The defendant's mother has been involved in --

11                  THE COURT: Well now, the report says his parents  
12 reside in Toronto.

13                  MR. AGNIFILO: No, his father lives -- his father has  
14 a -- the mother lives in Toronto full time.

15                  THE COURT: Okay.

16                  MR. AGNIFILO: Living in Toronto, if one can get to  
17 Boynton Beach, Florida, in January, I think --

18                  THE COURT: So he spends the winter in Florida, but  
19 he resides in Toronto?

20                  MR. AGNIFILO: I think he spends more than the  
21 winter. I think it's more of a -- he spends a great deal of  
22 time in Boynton Beach, Florida.

23                  And, Your Honor, we're talking about Canada. We're  
24 not talking about -- I don't believe that the Canadians would  
25 house this young man, especially when he is a U.S. citizen -- I

1 mean, the fact is, he is a U.S. citizen. And I don't believe  
2 he is a flight risk, given the facts here, given what he is  
3 looking at.

4 I mean, if one does a survey of jail terms in cases  
5 like this nationwide, they often result in a year, two-year, or  
6 less sentences. We're not talking about a major narcotics case  
7 where he's looking at ten years, 15 years. It's just not that  
8 kind of case.

9 And I think something that the prosecutor said is  
10 noteworthy. He said that the scheme overall is \$17 million or  
11 more, and that the defendant made about a million dollars.  
12 That leaves \$16 million. Which is my point, is that the other  
13 defendants are -- he is not so different in kind than the other  
14 defendants, and the defendants who were released on unsecured  
15 bonds.

16 I think if there's a difference, the difference  
17 should be that whereas the other three get an unsecured bond,  
18 he should get a secured bond. But he shouldn't be detained on  
19 these facts. I just don't believe there is anything in the  
20 record that suggests that this is a detention case rather than  
21 a case with a secured bond.

22 Thank you, Your Honor.

23 THE COURT: And what about Lexier, was he released?  
24 Or has he been arrested and come into the United States yet?

25 MR. NGUYEN: He is currently in Canada, Your Honor.

1                   THE COURT: Okay. You know, I have read the  
2 allegations in the indictment. And, frankly, the defendant's  
3 involvement here is not minimal, as you would suggest. It's  
4 very extensive. It is over a long period of time.

5                   He clearly, from the conversations that were  
6 recorded, knew what he was doing was illegal. And his ties to  
7 the United States simply are not strong enough. And I believe  
8 that the risk of flight is great. This is a presumption case,  
9 and I don't think that he has overcome that presumption.

10                  The defendant is remanded to the custody of the  
11 Marshal as a flight risk.

12                  MR. AGNIFILO: Your Honor, I don't believe it is a  
13 presumption case. And I don't think the Government thinks it  
14 is either.

15                  THE COURT: I thought you said the maximum was 100  
16 and what years?

17                  MR. NGUYEN: Yes, Your Honor, it is a very high  
18 statutory maximum, but it is not --

19                  THE COURT: Okay, that's fine. I still don't think  
20 that he's -- I framed it that way because the burden shifts,  
21 but I still don't believe that he -- that I have any assurance  
22 that he is going to stay here.

23                  So I am going to order that he be detained pending a  
24 trial as a flight risk.

25                  The defendant is remanded to the custody of the

1 Marshal.

2 MR. AGNIFILO: Thank you, Your Honor.

3 THE COURT: Thank you.

4 NOTE: The hearing concluded at 2:15 p.m.

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6

7 C E R T I F I C A T E   o f   T R A N S C R I P T I O N

8

9 I hereby certify that the foregoing is a true and  
10 accurate transcript that was typed by me from the recording  
11 provided by the court. Any errors or omissions are due to the  
12 inability of the undersigned to hear or understand said  
13 recording.

14

15 Further, that I am neither counsel for, related to,  
16 nor employed by any of the parties to the above-styled action,  
17 and that I am not financially or otherwise interested in the  
18 outcome of the above-styled action.

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23

/s/ Norman B. Linnell

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Norman B. Linnell

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Court Reporter - USDC/EDVA